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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Supreme Court No. R-15-0016

**PETITION TO REPEAL RULE
6(E)(4)(e)(2), ARIZONA RULES OF
PROTECTIVE ORDER
PROCEDURE**

**COMMENT OF
THE STATE BAR OF ARIZONA**

Victoria Timm, a self-claimed “visiting professor” from an unnamed institution, has filed a rule change petition to summarily repeal Rule 6(E)(4)(e)(2), Arizona Rules of Protective Order Procedure (“ARPOP”) based on the Arizona Supreme Court ruling in *State v. Serna*, 235 Ariz. 270, 331 P.3d 405 (2014). Because *Serna* does not apply to the issuance of protective orders and because courts are given statutory authority to place reasonable restrictions on a defendant, the State Bar of Arizona opposes the petition.

I. BACKGROUND OF PETITION

Rule 6(E)(4)(e)(2), Arizona Rules of Protective Order Procedure, 17A A.R.S. (ARPOP), provides guidance to judicial officers when entering protective orders pursuant to A.R.S. § 12-1809(F)(3). That statute allows the judicial officer to

1 “[g]rant relief necessary for the protection of the alleged victim and other
2 specifically designate person proper under the circumstances.” The ARPOP rule
3 gives guidance to judicial officers on the process for restricting the respondent’s
4 access to firearms for up to a year. The rule was previously the subject of an
5 unsuccessful citizen’s petition, 09-0045, which was based upon the claim such
6 restrictions violated the 2nd Amendment to the United States Constitution. Here, the
7 petition makes a constitutional claim based upon the 4th Amendment to the United
8 States Constitution and the Arizona Supreme Court decision in *State v Serna*, 235
9 Ariz. 270, 331 P. 3d 405 (2014).

12 II. DISCUSSION/ANALYSIS

13 1. Petitioner’s reliance upon *State v Serna* and the 4th Amendment is 14 misplaced.

15 The Petitioner seeks to repeal Rule 6(E)(4)(e)(2) because of the Petitioner’s
16 conclusion from the *Serna* decision, which held that a judicial officer cannot enjoin
17 possession of a weapon without reasonable suspicion that a crime is afoot. Petition
18 at 4. However, *Serna* does not apply to the situation of a civil injunction against
19 harassment. The issue in *Serna* was whether the officers could frisk Mr. Serna when
20 they did not have a reasonable suspicion that there was criminal activity. *Serna* at ¶
21 7. Citing *U.S. v Terry*, 392 U.S. 1, 30 (1968) and related cases, the court concluded
22 “...an officer may frisk an individual only when the officer possesses both a
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1 reasonable suspicion that the person to be searched has engaged or is about to engage
2 in criminal activity and a reasonable belief that the person is armed and dangerous.”
3 *Serna* at ¶ 28. The result of this decision was that Mr. Serna, who was a prohibited
4 possessor because of a prior felony conviction, had his conviction overturned. The
5 Court very specifically limited its holding to frisks conducted by police: “Our
6 holding governs only those circumstances in which the police wish to search a
7 person with whom they are engaged in a consensual encounter.” *Serna*, at ¶ 28.
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10 *Serna* provides no support for the Petitioner, because reasonable restrictions
11 by judicial order based upon a civil injunction are not akin to consensual encounters
12 by police, do not involve a frisk, and do not constitute a seizure under the 4th
13 amendment. “Only when the officer, by means of physical force or show of
14 authority, has in some way restrained the liberty of a citizen may we conclude that a
15 ‘seizure’ has occurred.” *Florida v Bostick*, 501 U.S. 429, 434 (1991)(Supreme Court
16 reversed Florida court’s decision that suppressed search and seizure of drugs from
17 Bostick because seizure occurred on a bus, without looking at the totality of
18 circumstances.) By contrast, in the context of an injunction prohibiting harassment,
19 no judicial officer is taking physical possession of any firearms, and the gun owner
20 does not lose ownership of their firearms. Instead, only during a period when the
21 court has reasonable cause to believe there is a risk of further harassment that might
22 escalate is the gun owner’s immediate access to their firearms reasonably restricted.
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1 2. The Courts have authority to make reasonable restrictions on a defendant
2 during the Injunction against Harassment.

3 A.R.S. §12-1809 provides Arizona citizens with a method to help protect
4 themselves from stalkers, violence and harassment through civil orders. It includes
5 broad powers for the courts which “attempt to construe statutes with ‘a reasonable
6 and constitutional meaning’ whenever possible in order to remove potential doubts
7 regarding the statute's viability.” *LaFaro v Cahill*, 203 Ariz. 482, 56 P.3d 56, ¶ 21
8 (2002) (court construed statute not to include political speech, but upheld the statute
9 as constitutional) [Citations omitted]. Courts have the authority to grant relief
10 necessary for the protection of an alleged victim of harassment and to make
11 reasonable restrictions on a defendant.
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14 3. The Courts have authority to reasonably restrict a defendant’s access to
15 firearms during the period of the injunction.

16 Reasonable restrictions on firearms are not unconstitutional. *District of*
17 *Columbia v Heller*, 554 U.S. 570, 626 (2008)(court struck down Washington D.C.
18 total ban on possession of handguns). Requiring gun owners to keep their firearms
19 secure in their homes has been found reasonable. *Commonwealth v McGowan*, 464
20 Mass. 232, 982 N.E.2d 495 (2013). Members of a gang in California could be
21 enjoined from possessing firearms within a designated area. *In re Englebrecht, Jr.*,
22 67 Cal.App.4th 486, 79 Cal.Rptr.2d 89 (1998). A firearms restriction for a defendant
23 subject to a civil injunction for harassment similar to the Arizona statute has been
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1 upheld. *Richie v Conrad*, 115 Cal.App.4th 1275, 10 Cal.Rptr.3d 387 (2004). Anger
2 management issues may arise in settings giving rise to these injunctions and a
3 firearm restriction “is thus a temporary burden during a period when the subject of
4 the order is adjudged to pose a particular risk of further abuse. [Citations omitted.]”
5 *United States v. Mahin*, 668 F.3d 119, 125 (4th Cir.2012). A restriction on
6 possession of firearms during the period of the injunction based upon the evidence
7 presented to the court and the opportunity for the gun owner to contest the order is
8 an appropriate restriction. Therefore the petition should be opposed.
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11 **III. CONCLUSION**

12 The State Bar of Arizona respectfully requests that the Arizona Supreme
13 Court deny Petition R-15-0016. Reasonable restrictions on a person’s access to
14 firearms during a period of a civil injunction do not amount to a seizure of a person’s
15 firearms and are not governed by the 4th Amendment or the decision in *State v.*
16 *Serna*.
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19 RESPECTFULLY SUBMITTED this 5th day of May, 2015.

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22 John Furlong
23 General Counsel
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1 Electronic copy filed with the
2 Clerk of the Arizona Supreme Court
3 this 10th day of May, 2015.

4 by: 